NO. 83-91
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

APTOS SEASCAPE CORPORATION,
a California corporation,

Appellant,

vs.

THE COUNTY OF SANTA CRUZ, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the questions raised are ripe for judicial determination by this Court.

2. Whether the appeal presents a substantial federal question since the judgment rests on an adequate non-federal basis.

3. Whether the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on.

PARTIES TO THE PROCEEDING

The parties are Aptos Seascape Corporation, a California corporation (Seascape), Appellant; the County of Santa Cruz, Board of Supervisors of the County of Santa Cruz and the Planning Commission of the County of Santa Cruz (collectively, the County), Appellees; and the California Coastal Commission as Amicus Curiae in the proceedings below.

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To the Honorable Justices of the United States Supreme Court:

Pursuant to this Court's Rule 16, Appellees hereby file this Motion to Dismiss the appeal filed by Appellant, Aptos Seascape Corporation (Seascape), on the grounds that it does not present a substantial question requiring plenary consideration and on the further ground that the Judgment of the California Court of Appeal rests on an adequate nonfederal basis. In the alternative, Appellees ask this Court to affirm the Judgment of the California Court of Appeal.

Appellant asked this Court to review this matter as if it were presented in a Petition for Writ of Certiorari. Appellees ask this Court, therefore, to treat this Motion to Dismiss or Affirm as if it were a Brief in Opposition to a Petition for Writ of Certiorari.

CONCISE STATEMENT OF JURISDICTION

Appellees submit the following corrections and clarifications of Appellant's "Concise Statement of Jurisdiction": (a) Appendix "B" does not include 18 Special Findings made by the Trial Judge on the inverse condemnation issues at the request of Appellees (See Clerk's Transcript [CT] 1971 through 1975, granting requests appearing from CT 1896 through 1910). (b) Appendix "D" does not include Appellees petition for rehearing in the California Court of Appeal. (c) Appendix "E" does not include Appellees' petition for hearing in the California Supreme Court nor does it include the amicus curiae brief of the California Coastal Commission in support of County's petition for hearing in said Court. (d) Appellant would have this Court believe that it has the votes of three California Supreme Court justices on its side in this case. This is attaching improper significance to a losing vote on all of the petitions for hearing. The petitions included a request for a hearing on the judgment in favor of Seascape on the cross-complaint for implied in law dedication. Exhibit "G" does not indicate that those who voted for a hearing wanted to hear the inverse condemnation or the cross-complaint causes to the exclusion of one or the other.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellees submit the following corrections and clarifications of Appellant's list of constitutional and statutory

provisions necessarily involved in this appeal: (a) 42 U.S.C. Section 1983 is not at issue and was never considered in the courts below. (b) Jurisdictional Statement Appendix (App. Jur. Statement) "J" does not include either the County ordinances relied on by the California Court of Appeal in overruling the trial court judgment or recent enactments affecting the property. See App. Jur. Statement, C-27 to C-28. The pertinent Santa Cruz County Code and ordinances omitted are:

1. *Section 13.04.305 Planned Unit Development* (Clerk's Transcipt [CT] 3042):

> "a. *Purpose.* In certain instances the objectives of this chapter may be better achieved by the development of planned units which do not conform in all respects with the land use pattern designated on the zoning map of the district regulations prescribed by this chapter. A planned unit development may include a combination of different dwelling types or a variety of land uses which complement each other and harmonize with existing and proposed land uses in the vicinity. In order to provide locations for well-planned developments which conform with the objectives of this chapter although they deviate in certain respects from the zoning map and district regulations, use permits for planned unit developments may be granted in accordance with Sections 13.04.305 to 13.04.308, inclusive, provided the developments comply with the regulations prescribed in this chapter.

b. *Districts.* A planned unit development may be located in any zoning district upon the granting of a use permit in accordance with the provisions of this Chapter.

c. *Permitted Uses.* A planned unit development shall include only uses permitted either as permitted uses or conditional uses in the zoning district in which the planned unit development is located, subject to the following exceptions:

1. Any use permitted in any residential or 'C-1' District either as a permitted use or a conditional use, or any combination of such uses may be included in a planned unit development on a site of ten (10) acres or more, located in an 'R-1', 'RR' or 'RM' District."

2. *Section 13.04.212-A Regulations for Commercial or "C" Districts. Conditional Uses. "C-1" Neighborhood Commercial Districts* (CT 2988-2989) provides, in part:

"a. The following conditional uses may be permitted in 'C-1' Neighborhood Commercial Districts upon the granting of a use permit in accord with the provisions of Section 13.04.320 et seq:

1. . . .

5. Hotels and motels . . .

10. One-family, two-family and multiple dwellings and grounds or combinations thereof when developed in accord with requirements of the 'RM-1000' District . . ."

3. *Section 13.04.195 Regulations for Multiple-Family Residential or "RM" District - Site Area per Dwelling Unit and Per Structure - Site Frontage - Site Width - Site Depth* (CT 2969) provides, in part:

"a. Site Area.

District	Minimum Site Area Per Dwelling Unit
'RM-1'	1,000 square feet . . ."

4. *Section 13.04.051 Elimination and Reclassification of Zones* (CT 2931) provides, in part:

"a. The following zone classifications existing prior to the effective date of this Section are eliminated and repealed, and on said date any land or property subject to said zone classifications is reclassified to the zone classification designated herein:

1. . . .

8. RM-1000 to RM-1 . . ."

5. *Section 13.04.110-D Depth through Dwelling Unit (Definitions)* [CT 2936] provides, in part:

"'Dwelling' - A one-family dwelling, multi-family dwelling or lodging house. For purpose of this definition, automobile trailers, hotels, motels, . . . shall not be deemed dwellings."

6. *Section 13.04.121 Regulations for Unclassified or "U" Districts. Permitted Use* (CT 2945) provides, in part:

"The following uses shall be permitted subject to the provisions of Section 13.04.300:

1. Any use permitted in the 'R-A', 'RR-1', 'RR-2', 'R-1', and Agricultural Districts except hog or mink farms . . ."

7. *Section 13.04.122 Regulations for Unclassified or "U" Districts. Conditional Uses* (CT 2945) provides, in part:

"The following conditional uses shall be permitted upon the granting of a use permit in accord with the provisions of Sections 13.04.320 et seq., and subject to the provisions of Section 13.04.300:

1. Uses which require a use permit in the 'R-A', 'RR-1', 'RR-2', 'R-1' and Agricultural Districts.
2. All permitted uses or uses requiring a use permit in the 'R-M', 'REC', 'C', or 'M' Districts.
3. Commercial hog farms or mink farms.
4. Labor Camps . . ."

8. Ordinance No. 3315, adopted November 23, 1982, renumbered Chapter 13.04 Zoning Regulations as Chapter 13.10.

9. Ordinance No. 3345, adopted November 23, 1982, provides, in part:

"SECTION I. The Sectional District Maps adopted pursuant to Section 13.10.130 are hereby amended by the changes in zone district names and rezoning from one zone district to another, as follows:

PREVIOUS DISTRICT NEW DISTRICT

Basic Zone Districts

'C-3' . . .

'U' Special Use 'SU' Special Use . . .

SECTION II. The Section District Maps adopted pursuant to Section 13.10.130 are hereby amended by deleting all of the following combining Zone Districts:

'Building Site (BS)' . . .

SECTION III. The Sectional Maps adopted pursuant to Section 13.10.130 are hereby amended to zone all parcels within the Coastal Zone Boundary shown on the Coastal Zone Rezoning Maps, Exhibit A, to the 'Coastal Zone (CZ)' combining district . . . ."

RAISING THE FEDERAL QUESTION

Appellees submit the following corrections and clarifications to Appellant's allegations regarding raising of the federal question: Appellant neither pleaded (CT 1 Complaint; CT 68, First Amended Complaint) nor proved a violation of the Civil Rights Act [42 U.S.C. Sections 1983 et seq.]. See App. Jur. Statement, B-1 to B-35, Findings of Fact; B-35 to B-39, Conclusions of Law; A-1 to A-12, Judgment. Appellant did not refer to the Civil Rights Act in its responses to County motions (CT 774, 827, 895, 992, 1418) or in its trial briefs (CT 1404, 1716). The trial court did not expressly or impliedly pass on the application of

the Civil Rights Act (App. Jur. Statement, "A" and "B"). Similarly, the Court of Appeal did not refer to the Civil Rights Act at all (App. Jur. Statement, C-1 to C-50). Appellant first raised the spectre of the Civil Rights Act in its reply brief in the California Court of Appeal, page 29.

STATEMENT OF THE CASE

The California Court of Appeal's summary of the facts in ***Aptos Seascape Corp. v. County of Santa Cruz***, 138 Cal.App.3d 484, 489-491 (1983) [App. Jur. Statement, C-2 to C-8] is more accurate than that of Appellant (Jur. Statement, C-2 to C-8). Appellant's Statement of the Case contains only argument, opinion, and conclusions of law inextricably intertwined with some selected facts that could be distorted so as to appear to support this appeal. In doing so, Appellant resurrects the trial court's findings based on an erroneous interpretation of the County laws. The trial court had found that the zoning of R-1-6-PD on a portion of the 110-acre parcel precluded the consideration of a Planned Unit Development to allow a greater density to compensate Seascape for not piling the grading debris on the beach to construct roads and lots (See Opinion, Jur. Statement, C-28). This legal conclusion adopted by the trial court which was the *sine qua non* for a finding of a taking by the County was expressly rejected by the Appeal Court (App. Jur. Statement, C-29). At page 13, Appellant cites ***Campbell v. Southern Pacific Co.***, 22 Cal.3d 51; 148 Cal.Rptr. 596, 583 P.2d 121 (1978) to suggest that the appellate court improperly overruled the trial court on this

question of law. ***Campbell*** rejected appellate court changes of facts found by a jury.

The Appellant goes further and seeks to conceal from this Court all of the pertinent ordinances which shows the trial court error (Jur. Statement, p. 11).

We will address Appellant's points under this heading to point out the more gross distortions.

Appellant's last sentence under the sub-heading "A", p. 7, erroneously concludes that the subject property had been given a zero density.

Under the sub-heading "B", pp. 7-8, Appellant erroneously suggests that the County can take private property for open space by means of excessive regulation. The statutes cited do not support this claim, nor do they excuse the County from proceeding under the Eminent Domain Law (Code of Civ. Proc. Sections 1230.010, et seq.). The last paragraph of "B" erroneously concludes that the County had acquired the subject property, a conclusion that was expressly rejected as a matter of law by the Court of Appeal (App. Jur. Statement, C-30).

Under the sub-heading "C", pp. 8-9, Appellant erroneously suggests that the County was unable to provide the so-called compensating densities in the absence of some unexplained "Planned Community District". The Court found that under the Sections of the County Code omitted from Appendix "J" by Appellant, e.g., 13.04.305; 13.04.212-A, subdiv. (a) pars. (5) and (10); 13.04.195, subdiv. (a); 13.04.051, subdiv. (a), par. (8); and 13.04.110-D, the County could still grant compensating densities if and when Seascape ever asks for them (App. Jur. Statement,

C-28). Appellant suggests that the Public Recreation and Open Space Plan (PROS) which was adopte[illegible]ter the date of the alleged taking in December 1972 required immediate action to acquire the beach. The PROS plan assigned a "low priority" to the acquisition (See Opinion, App. Jur. Statement, C-5). The PROS Plan and the 1974 Aptos General Plan were both adopted after the date of the so-called taking by adoption of Ordinance No. 1800 on December 5, 1972 (App. Jur. Statement, J-5 to J-6). The bluff and beach on Seascape's 110-acre parcel were placed in "Open Reserve" by the PROS Plan and in "Open Space-Recreation Scenic, Park-Playground by the 1974 Plan. A simple "Park-Playground" designation used by Appellant at pages 9 and 11 may give some support to its case, but is, at best, misleading (See Opinion, App. Jur. Statement, C-5).

Appellant's sub-heading "D", pp. 9-13 would have the Court believe that it exhausted its remedies by submitting a tentative map for Tract 553, Unit 7 some 21 months before the passage of Ordinance 1800. Tract 553 would have subdivided the whole of the 110 acres without regard to the so-called natural boundaries it now claims exist between the 40 acre benchland and the land below the 100-foot contour. Indeed, Tract 553 proposed the massive bull-dozing of the bluffs and benchlands to obtain fill to raise the beach some 16 feet for installation of a 4800-foot road where the beach used to be. Seascape's hypothetical development for purpose of valuation continued the concept of filling of the beach with debris from the uplands (Special Finding No. 98, CT 1908, 1975; Def.Exs. C, D, Reporter's Transcript, Vol. IV, p. 4 [RT IV 4]). The

parties and the trial court agreed that Tract 553 was properly denied. In the Reporter's Transcript (RT IX 153) the trial court, speaking of Tract 553, said, in the presence of the parties and without objection:

> "The Court: I haven't heard a single quarrel about turning that plan (Tract 553) down . . . they haven't stated that . . . the County did them wrong or anything."

Even if Appellant could claim that Tract 553 was a bona fide attempt to develop the property (which we do not concede), the Tract was disposed of long before the adoption of Ordinance 1800 and cannot be considered an exhaustion of remedies under that ordinance. After Ordinance No. 1800, Seascape was entitled to 290 units (40ac. x 7.25 units) on the still intact 110 acres (See First Amended Complaint [Complaint] CT 75). Without a development plan before it, the County was unable to guess how Seascape would propose to preserve the environment or to determine whether Seascape's proposed density for new construction should be offset by forebearance of construction on other parts of the parcel. This Court has already determined that preservation of the environment and open space is a proper concern of government (***Agins v. City of Tiburon***, 447 U.S. 255, 262, 100 S.Ct. 2138, 65 L.Ed.2d 106, 113 [1980] affirming 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1978).

Appellants state that the County could not extend its interim zoning more than two times (Jur. Statement, 10).

Section 65858 of the Government Code merely limits the total length of the time an interim zoning can be in

existence. It says nothing about the number of extensions that may be granted to achieve that length of time. Neither the trial court nor the Court of Appeal gave credence to Appellant's interpretation (App. Jur. Statement, A, B, C).

Seacape made no formal application other than Tract 553 on which the County could act (App. Jur. Statement, C-4). The Goetz Plan was not a formal application on which the County could act. The record is devoid of any evidence of the disposition of the Goetz Plan. It was not offered in evidence by Appellant and Mr. Baker, the Planning Director, testified that it just disappeared (RT VII 55, See Opinion, App. Jur. Statement, C-4). The Goetz sketch was not offered after adoption of Ordinance 1800.

The Court of Appeal observed that the Planning Director had answered a question about rights under a PUD with a response that applied only to Planned Development (PD) permits. Consequently, his response could only be categorized as ambiguous (App. Jur. Statement, C-20, Fn. 6). In spite of this clear holding, Appellant persists in making the flat, false statememt that the Board of Supervisors had been informed by the Planning Director that increased densities were impossible under a PUD permit and continues to cite this same ambiguous exchange as evidence that the Board of Supervisors did not intend to issue a PUD on the R-1-6-PD property (See Jur. Statement, 10).

Contrary to Appellant's contention, Section 65860 of the Government Code did not require that zoning ordinances conform to the local agency's general plan until January 1, 1974, more than two years after the adoption of Ordinance 1800 which allegedly took Seascape's property.

Section 13.04.323, subdiv. (c) does not require conformance with general plans in case of PUD permits in an R-1-6-PD zone on part of the 110-acre parcel. Subdivision (c) applies only in the "U", unclassified zone (App. Jur. Statement, J-3).

Sub-heading "J" contains other arguments which must stand or fall on the validity of the trial court's erroneous conclusion of law that County law absolutely precluded the consideration of increased density on the R-1-6-PD zoned portion of the 110-acre parcel in addition to the usual 7.25 units per acre which would yield 290 units (7.25 units/ acre x 40 acres) on that portion of the 110 acres (See Opinion, App. Jur. Statement, C-24, C-29).

In our argument, infra, we propose to respond to other arguments in this subdivision as well as those in Appellant's Statement of Reasons Why the Questions Presented are Substantial (Jur. Statement, 13-19).

SUMMARY OF ARGUMENT

Issues raised by Appellant are neither ripe for adjudication nor otherwise justiciable since the Court below found the County's laws to be neither facially unconstitutional nor unconstitutionally applied.

California's rule denying money damages for excessive regulation by a zoning ordinance is not properly before this Court since the Court below found that the County ordinances took no property.

A cause of action under the Civil Rights Act was neither timely nor properly raised. The cause was not litigated by the parties and was not expressly passed upon by either the trial or appellate court.

ARGUMENT

COUNTY'S LAWS ARE NEITHER FACIALLY UNCONSTITUTIONAL NOR HAVE THEY BEEN UNCONSTITUTIONALLY APPLIED TO SEASCAPE'S 110-ACRE PARCEL

The issue in the trial court was whether or not County had taken a part of Seascape's undivided 110-acre parcel by placing two zone designations on it. The beaches and bluffs which rise steeply from the beach to the 100-foot elevation, were placed in a zone (UBS-50 Acre) in which nearly any use is permitted provided a conditional use or planned unit development permit was obtained (Sections 13.04.121 and 13.04.122, County Code, supra, Ordinances). The site area of 50 acres required that the site for the use permit contain at least 50 acres, e.g., the entire beach and bluff area was to be the subject of one development permit. This zone carried out the requirement that use of the bluffs (palisades) be treated with the utmost care (1967 Aptos Plan, Pl.Ex.4A, RT I 116, CT 827-A33, 827-A37, 827-A40). The 1967 Aptos Plan provided that the no incompatible use be permitted on the beach. California cases have held that a local agency may restrict development of a beach to beach uses (*McCarthy v. City of*

Manhattan Beach, 41 Cal.2d 879, 884, 264 P.2d 932 (1953) cert. den., 348 U.S. 817, 75 S.Ct. 644, 99 L.Ed. 644.

Most of the 110-acre parcel lying above the 100-foot elevation was placed in an R-1-6-PD zone which generally permits 6,000 square foot lots with single family residences. Mathematically this would permit 7.25 units per acre or 290 units on the 40 acres (Appellant concedes 258 units—First Amended Complaint (Complaint) CT 75). Based on this Court's decision that a limitation of one house per acre in Tiburon was not a taking, the conclusion is inescapable that 258 units on 110 acres cannot be facially unconstitutional nor is such a restriction unconstitutionally applied. (*Agins v. Tiburon, supra,* 447 U.S. 255, at 263. The mathematics dictate a finding here that the County's ordinances were reasonable. It is not necessary to compare the utter lack of evidence of an intention to acquire Seascape's property, particularly when compared to local agency action in *Tiburon, supra*.

Here, the California Court of Appeal reversed the trial court judgment on the same ground stated by the United State Supreme Court in *Agins v. City of Tiburon, supra*, 447 U.S. 255, 262-263.

In the Opinion (App. Jur. Statement, C-30) the Court of Appeal said:

> "'At this juncture, [Seascape is] free to pursue [its reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied [its] the 'justice and fairness' guaranteed by the Fifth and

> Fourteenth Amendments. [Citation.]' (Fn. omitted.] *Agins v. Tiburon, supra*, 447 U.S. 255, 262-263.)"

The Court of Appeal also held that because the property of Seascape had not yet been dealt with at the development stage, e.g., no development plan had been submitted, it was impossible to determine whether Seascape would suffer an uncompensated loss by an unreasonable denial of use of the whole 110-acre parcel such that any part could be deemed to have been taken (Opinion, App. Jur. Statement, C-22). Appellant's case is untenable if the 110-acre parcel is not held to have been divided by the enactment of Ordinance 1800 because it is familiar law that mere diminution of value is not a taking of property. ***Penn Central Transportation Co. v. New York City***, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) and cases cited therein. See also ***HFH, Ltd. v. Superior Court***, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975) cert. den. 425 U.S. 904.

The Court of Appeal cited with approval ***American Sav. & Loan Ass'n v. County of Marin*** (9th Cir. 1981) 653 F.2d 364 wherein it was held that it could not be determined whether a parcel was taken by diverse zoning of parts thereof until there was evidence of how the property was treated at the development stage by local authorities. See Opinion, App. Jur. Statement, C-22.

The Court of Appeal has also held that Ordinance 1800 gave the County the power to give densities greater than the 258 or 290 units mathematically available on the R-1-6-PD zoned property through use of a PUD permit. Appellant has hidden the County Code Sections which that Court held permitted this flexibility (Opinion, App. Jur.

Statement, C-28). As a matter of law (and common sense) the discretion is in the County. Until Seascape asks for a determination of density based upon a development plan, the County cannot be expected to guess at what Seascape wants to do. This case is not ripe for judicial intervention before the County has a chance to see development plans of some sort. As in ***San Diego Gas Co. v. San Diego***, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), the result of this litigation is that it is now up to Seascape to produce some development plans that show what it wants to do. Until a permit is applied for, we will never know how the County proposes to balance the public interest in preserving the environment and natural land forms and Seascape's desire to build houses on the beach.

Seascape relies heavily on the overruling of California's rule regarding money damages where an ordinance has so restricted the use of property so as to remove all reasonable use thereof. It hopes that the newest justice will join the three dissenters in the ***San Diego case, supra.*** However, we contend that even if the rule suggested by the dissent of Mr. Justice Brennan is adopted by the Court in a proper case, it will do Seascape no good. The dissent would give the County the opportunity to repeal any action considered to be a taking and leave judgment only for the interim damages suffered by the property owner during the improper restriction. Here, Seascape has produced no plans to use the property. Indeed, from 1971 through 1979, Seascape could not have developed the property if it wanted to because of a sewer moratorium (Special Findings No. 15, CT 1895, 1972, No. 20, 1896, 1972; Def.Exs.M, M-2, M-3, M-4, M-5, M-6 [RT X 12]).

Because of Seascape's stubborn refusal to make plans for use of its property, the laws on which this litigation was based are no longer in effect and the appeal is thereby moot. The beach and bluff part of the 110-acre parcel are no longer in the UBS-50 acre zone. Ordinance No. 3345 (Item 9, supra, Ordinances Involved) has designated the property in a SU-SZ, Special Use, Coastal Zone district. The Special Use zone district permits the same uses as a "U" zone, but the SZ zone makes the property subject to the land use plan of the Local Coastal Program (LCP) mandated by the Coastal Act of 1976 (Sections 30000 et seq., Pub. Resources Code). The County has complied with the Coastal Act of 1976 and now has a certified LCP which covers the the Seascape property (Sections 30500, 30512.1, Pub. Res. Code) and is now the administering authority of such LCP in this County (Section 30519, Pub. Res. Code). Appeals from County decisions are taken to the California Coastal Commission whose decision is final (Section 30603, Pub. Res. Code).

Even a casual reading of the Coastal Act of 1976 makes it readily apparent that County's control of development in the Coastal Zone (Seascape's property is within that zone—Special Finding Nos. 40, 47, 53, 54, CT 1899-1901, CT 1972) has been pre-empted by the State. The State must certify and approve the LCP, the State Commission makes the final decision on appeals.

The Coastal Act of 1976 is the legislatively approved implementation of the California Coastal Zone Conservation Act of 1972 (Sections 27000 et seq. Pub. Res. Code) which was adopted by initiative in November, 1972 prior to the adoption of Ordinance 1800 by the County. Cases

interpreting that Act have clearly established that the policy of the State is to protect the diminishing resources of the Coastal Zone.

In ***Georgia Pacific Corporation v. California Coastal Commission***, 132 Cal.App.3d 678, 183 Cal.Rptr. 395 (1982) the Court held that the Coastal Commission could require dedication of a sandy beach as a condition of a coastal development permit. In ***Associated Home Builders v. City of Walnut Creek***, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971), app. dism. 404 U.S. 878, 92 S.Ct. 202, 30 L.Ed.2d 159, 43 A.L.R.3d 847, the Court held that a local government could require a property owner to dedicate park land as a condition of government approval for development of property.

Thus, any ruling by this Court on the laws applicable in 1972 or in 1982 would have no effect on Seascape's rights to develop its property under present laws. Until a case has been tried evaluating County's administration of those laws as applied to a concrete development proposal, there is no controversy ripe for judicial review in this Court.

THE ISSUE OF WHETHER OR NOT THE CALIFORNIA RULE DENYING MONEY DAMAGES FOR EXCESS REGULATION BY A ZONING ORDINANCE IS CONSTITUTIONAL IS NEITHER RIPE FOR ADJUDICATION NOR OTHERWISE JUSTICIABLE IN THIS CASE.

This Court should not review the California rule that refuses to award money damages even where zoning

regulations are too strict in the context of this case where it was determined that the ordinances were not so strict as to be considered a taking. This case is on all fours with *Agins v. City of Tiburon, supra*, 447 U.S. 255, at 262-263 where this Court found that a California Supreme Court finding that there had been no taking was sufficient to validate a Tiburon ordinance. Here, we have the same situation. Although the Court of Appeal stated that it was constrained to follow the rule regarding money damages propounded in *Agins, supra,* 24 Cal.3d 266 (App. Jur. Statement, C-15) it did go on to find that the ordinances do not constitute a taking.

The Court's reference to a condition on dismissal of the count for declarative relief and referring to compensating higher densities must be considered as an attempt to channel future controversies, if any, into the trial court for resolution on a timely basis. The expression does not suggest that the Court considered the ordinances to be a taking, particularly in the light of the express finding to the contrary which the Court had spent some time to explain.

APPELLANT FAILED TO RAISE AN ISSUE OF VIOLATION OF THE CIVIL RIGHTS ACT IN EITHER A TIMELY OR PROPER FASHION.

Appellant first raised the issue of a violation of the Civil Rights Act (42 U.S.C. Sections 1983, et seq.) in its reply brief in the Court of Appeal (Resp. Reply Brief, 29). As a consequence, the issue was never framed in a form which

would permit the parties to litigate the issues peculiar to that cause of action. Similarly, neither the trial court nor the appellate court were able to pass expressly on that issue.

CONCLUSION

For the foregoing reasons, Appellees respectfully urge this Court to dismiss the Appeal and/or affirm the decision of the California Court of Appeal and further refuse to issue the alternative writ of certiorari in this case.

Respectfully submitted,
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